SUPREME COURT, U. S.

SEP 20 1961

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 426

KONINKLIJKE LUCHTVAART MAATSCHAPPIJ N.V. KLM ROYAL DUTCH AIRLINES HOLLAND and SOCIETE ANONYME BELGE D'EXPLOITATION DE LA NAVIGATION AERIENNE,

Petitioners,

—against—

GERTRUDE OWEN TULLER, individually and as Executrix under the Will of William Gordon Tuller, deceased, KATHERYN L. TULLER, a minor by GERTRUDE OWEN TULLER, her mother and next friend, and JEAN E. TULLER, a minor by GERTRUDE OWEN TULLER, her mother and next friend,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The above-named petitioners respectfully pray for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered herein June 23, 1961.

affirming the judgment of the United States District Court for the District of Columbia entered on January 12, 1960.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Opinions Below

Following the rendition of the jury's verdict defendants moved for judgment notwithstanding the verdict and in the alternative for a new trial. This motion was overruled without opinion by the district court on February 8, 1960. The opinion of the Court of Appeals affirming the judgment of the district court is not yet officially reported but a copy thereof is printed in the Appendix infra, pages 31 to 52.

Petitioners seek a review of the determination of the United States Court of Appeals for the District of Columbia Circuit affirming a judgment of the United States District Court for the District of Columbia awarding respondents the sum of $350,000 for the death of respondents' decedent as an aftermath of an airplane accident in the estuary of the Shannon River in Ireland on September 5, 1954. The flight was "international transportation" within the terms of the Warsaw Convention, an international treaty, to which the United States has adhered, and therefore the action was subject to the limitation provisions contained in Article 22 thereof which limits recovery to $8300 in the absence of wilful misconduct.

The Questions Presented

1. Whether the lower courts in the case at bar have so flagrantly disregarded the rules of law governing limitation of liability and wilful misconduct as defined by the Warsaw Convention as to nullify and destroy the Convention, thereby requiring this Court's power of supervision.

2. Whether in equating "wilful misconduct" with "the negligence in question", the Court of Appeals has totally disregarded the intent of the drafters of the Warsaw Convention, so as to render that treaty nugatory and void and deprive petitioners of rights under the treaty.

3. Whether the sanction by the Court of Appeals of the misuse in the district court of an order or regulation of the Irish government, found not to have been violated, but forming a major basis of respondents' claim of wilful misconduct, was such a flagrant departure from the accepted and usual course of judicial proceedings as to require the exercise of this Court's power of supervision over both courts.

4. Whether the Court of Appeals, in order to sustain the verdict of the lower court, (a) did not exceed its powers by pronouncing a new rule of law requiring airlines to instruct passengers with respect to life vests before taking off from runways in foreign countries, and (b) did not by such pronouncement ignore the Chicago Convention, an international treaty, thereby requiring an exercise of this Court's power of supervision.

5. Whether in permitting respondents to impeach one of their own witnesses by use of his prior statement, not part of the res gestae but extremely prejudicial to petitioners because of its inflammatory nature, the district court so far departed from the accepted and usual course of judicial proceedings as to require an exercise of this Court's powers of supervision.

6. Whether the district court's denial to petitioners' attorney of the right to object to its charge to the jury, in contravention to Rule 51 of the Federal Rules of Civil Procedure, was such a departure from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision.

7. Whether the district court's charge on five occasions that Sabena, the dispatch agent, was liable for the misconduct of KLM, the principal, just as the principal was liable for the agent's misconduct, and the Court of Appeals' sanction of such a charge, has established a rule of law in conflict with the basic laws of principal and agent.

Treaties, Rules and Irish Order Involved

Treaties

Convention for the Unification of Certain Rules Relating to International Transportation by Air [49 Stat. 3000, et seq.], commonly known as the Warsaw Convention.

Convention on International Civil Aviation [61 Stat. 1180, et seq.], commonly known as the Chicago Convention.

Rules

Rule 26, subdivision (f), and Rule 51 of the Federal Rules of Civil Procedure.

Order

Section 23, subdivision (6)(iii), of the Irish Air Navigation (Operations) Order, 1953.

Pertinent provisions of the foregoing treaties, rules and order are printed in the Appendix infra, pages 25 to 30.

Statement of the Case

Petitioner, KLM, is a Dutch airline engaged in international transportation and is a corporation organized and existing under the laws of the Netherlands. Petitioner, Sabena, is a Belgian airline engaged in international transportation and is a corporation organized and existing under the laws of Belgium. The decedent, William Gordon Tuller, was a passenger on a flight of KLM from Amsterdam to New York which crashed not more than 42 seconds after becoming airborne on its takeoff from its intermediate stop at Shannon, Ireland. The plane crashed in the Shannon Estuary at a point approximately 7,325 feet from the end of the airport runway. As the wheels of the plane left the ground, the control tower radioed its precise takeoff time but no acknowledgment was received from the plane. Receiving no response, the tower made repeated attempts to make radio contact, without success.

After the plane became airborne, the pilots thought that the plane was climbing in the darkness when it suddenly made contact with the water and the crash resulted. Immediately after the crash and in order to prevent fire the main switch was cut, thereby throwing the plane into complete darkness but the crew evacuated passengers into two rubber dinghies which were ejected from the left wing by a mechanical release handle located in the cockpit. Tuller and another passenger made their escape through a rear escape window and swam to the tail of the plane which had, in the meantime, settled sufficiently to enable them to climb up upon the tail. At the time they evacuated the plane they did not know that it had come down on the water but thought that it had come down on land (JA 111a).* Sometime later, pursuant to the command of the plane's captain, the first dinghy, in charge of first officer Parfitt, attempted to work its way to shore. Shortly thereafter shouts from the tail of the plane were heard by members of the crew in the second dinghy and the crew in that dinghy then attempted to maneuver the dinghy around the wing to the tail but their efforts were unsuccessful due to the tide and wind and the size of the paddles.

For over four hours Tuller and his companion remained on the tail in a rising tide. Near dawn, after a member of the crew from one of the dinghies finally reached shore, information of the crash and its location reached the tower, and a launch was dispatched to the crash scene. Just as the launch approached, with the water by then chest high, Tuller shook hands with

* JA references are to the Joint Appendix in the Court of Appeals.

his companion, waved to the launch, lost his footing and slipped into the water (JA 116a); his body was later recovered. Ellis, the other passenger on the tail, was rescued.

The jury was instructed that under the Warsaw Convention, which the court ruled covered the liability of the airline and Sabena, its dispatch agent, the damages were to be limited to $8300 unless defendants, or either of them, was guilty of "wilful misconduct", in which case the $8300 limit did not control. The jury returned a verdict for the plaintiffs in the amount of $250,000.

At the close of the entire case the trial judge denied defendants' motion that it direct the jury "that in the event that they find wilful misconduct that they specify in a special verdict what the act of wilful misconduct is that they found" (JA 572a). Consequently, what act or acts the jury may have considered to be wilful misconduct is unknown. The Court of Appeals determined that the alleged wilful misconduct of the appellants in this case resolved itself into four elements, to wit: (1) failure to properly instruct passengers of the location of life vests and in their use; (2) failure to broadcast an emergency message; (3) failure to take steps to provide for the safety of Tuller after his peril was known; and (4) failure of Sabena to be aware of the loss of radio communication with the plane and to initiate prompt search and rescue operations (App. 37).*

* App. references are to pages of the appendix to this petition

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals has so far sanctioned departures by the district court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A. The Alleged Wilful Misconduct in Failing to Instruct Passengers of the Location of Life Vests and Their Use is Based Upon a Total Disregard of the Controlling Effect of Irish Law and the Chicago Convention.

Respondents' proof concerning this item was the testimony of passenger Ellis that no announcement or instructions concerning life vests was made to the passengers before the takeoffs or during the flight from Amsterdam to Shannon and that he did not know where the life vests were located. Respondents also introduced into evidence an order or regulation of the Irish government. This regulation did not require life vest instructions unless and until a flight was more than 30 minutes travel from land (the Irish coastline). This flight, of course, crashed less than a minute's distance from the airport and had not even reached the Irish coastline. The Court of Appeals recognized that the regulation was not violated (App. 37) but then it made the remarkable statement that "We are not bound by the limits of the Irish Government's regulations as to when life vest instructions should be given to fulfill the duty of care owed to passengers." (App. 38)

The foregoing statement by the Court of Appeals was in direct disregard of Article 11 of the Chicago Convention (App. 28), an international treaty and therefore part of the supreme law of the land. Pursuant to that treaty provision, the Irish laws and regulations relating to the operation of aircraft engaged in international air navigation while within Irish territory were the laws and regulations to be applied to the flight involved in this litigation.

The Court of Appeals also stated that "the jury could reasonably have inferred that if Tuller had been wearing a life vest his life could have been saved." This completely ignored the fact that plaintiffs' counsel, out of the hearing of the jury, admitted that decedent died "from shock and exposure and not from drowning" (JA 358a) while arguing for the introduction into evidence of a death certificate of the Irish government.

In his closing statement, plaintiffs' counsel belabored the point that KLM had violated the Irish regulation (JA 574a-576a, 597a) and, over defendants' objections, the court permitted him to continue with such argument (JA 630a). And in his final concluding remarks he again charged that KLM had violated this Irish regulation (JA 633a). Nevertheless, despite the district court's ruling during the trial that what had transpired with relation to the trip from Amsterdam to Shannon was immaterial and should be excluded (JA 158a, 286a), and despite the Court of Appeals finding that the Irish regulation was not violated, the latter made the incomprehensible statement (App. 43) that "the applicability of the [Irish] order was a fair subject of comment in argument and there is no substantial basis for disturbing the verdict on this ground."

B. The Second Alleged Item of Wilful Misconduct, to-wit, the Failure of the Crew to Broadcast an Emergency Message, Is Based Upon the Erroneous Admission Into Evidence of Irrelevant Documents, and the Failure of the Court to Properly Charge the Jury or Afford Defendants an Opportunity to Except to Such Failure.

In its opinion the court speculates as fallaciously as did plaintiffs' counsel in his summation as to what effect a distress message with the words "May Day" might have produced if such a message had been sent by a member of the crew. The court asserts that if such a message had been sent, the authorities would have immediately been aware of the crash and that rescue equipment would have been dispatched promptly rather than four hours later. However, nobody so testified at the trial. As a practical matter, if such a message had been sent it would not have alerted or advised anyone that the plane had crashed; it would merely have indicated that the plane was in trouble but not whether it was in the air, on the ground, or in the water.

Additional serious error was committed by the introduction into evidence of pages of a KLM manual relating to planned ditching procedures. Parfitt, the copilot, pointed out that these ditching procedures referred to "a planned emergency landing on water", whereas "an involuntary contact with the water * * * is more in the nature of a crash" and that he would not call the latter a ditching (JA 211a-212a). Plaintiffs' counsel then read from a prior deposition in which the witness had testified (JA 213a):

"Q. What instructions do you have in case of

> an involuntary landing on water? A. The only thing one can do in case of an involuntary landing on water is to try to carry out as many of the instructions for a planned landing on water as are possible. Some of these instructions require foreknowledge and a certain amount of time to organize the ditching."

Based on this wholly improper foundation and despite the fact that the witness had stated that a planned ditching and a crash were two entirely different things, the court admitted the pages, relating to what should be done before a planned ditching, into evidence. Thereafter, plaintiffs' counsel read to the jury such provisions about notifying surface stations and ships of an emergency as soon as it arises (JA 437a-438a), and in his summation, plaintiffs' counsel was permitted to make improper accusations against the crew for not performing duties described in these pages, although they were wholly inapplicable to the unanticipated crash.

In overruling defendants' objection to the introduction of the pages of this manual into evidence, the trial court said (JA 49a): "When I charge, I will try to give the jury the situation."

However, the court never did charge or instruct the jury on this matter and defendants' counsel was deprived of the right to except to the court's failure to do so. This was a particularly serious error in view of the charges of plaintiffs' counsel in summation concerning the failure of the radio operator to perform duties referred to in this irrelevant exhibit (JA 578a, 584a).

The Court of Appeals not only condoned these prejudicial errors but actually quoted one of these irrelevant paragraphs from the KLM manual in its opinion, as support for its affirmance of the judgment (footnote App. 38).

C. The Third Alleged Item of Wilful Misconduct, to wit, the Failure to Take Steps to Provide For the Safety of Tuller After His Peril Was Known, is Based on the Sheerest Speculation on the Part of the Court.

The Court of Appeals found, as it had to, that the crewmen in the second dinghy had attempted to maneuver the dinghy around the wing of the plane to the tail to rescue Tuller as soon as they heard shouts from the tail. The court also found that "the round rubber vessel would not respond to their paddles and instead drifted with the tide towards the shore." The court then speculated on various methods which it assumed that the crew might have followed in efforts to rescue Tuller from the tail of the plane (App. 40). However, each such suggested course of action was not only impractical but there was not one word of testimony that any such suggestion could have been followed on that fatal night—considering the condition of the plane, the darkness, the tide, and the wind in effect at that time. As a matter of fact, to suggest that Tuller could have been saved by being led along the slippery curved top of the outside surface of the fuselage of the plane, as the Court of Appeals did, is ridiculous. A rescue over such a surface on dry land in the daytime would have been an extremely hazardous feat but it was totally impossible under the conditions that existed on the night in question. Yet it is upon the failure to take

just such "rescue actions" that the Court of Appeals attempts to spell out wilful misconduct on the part of the defendants.

D. The Fourth Alleged Item of Wilful Misconduct, to wit, the Failure of Sabena to be Aware of the Loss of Radio Communication With the Aircraft and to Initiate Prompt Search and Rescue Operations, is Based Upon an Improper Charge to the Jury to Which Defendants Were Denied Opportunity to Except.

Everything that was possible to be done was being done by the governmental authorities to make contact with the plane from the time it departed from the Shannon Airport up to the time the first survivor reached shore. Had Sabena known that the plane was out of radio contact immediately following the takeoff, the only thing it could have done was to urge the Irish government control services to make every effort to make contact with the plane. However, that is exactly what these air traffic control services were doing from the time of takeoff until the time the plane was discovered (JA 525a-563a). The testimony in the case was undisputed that all of the air traffic control services were provided by the Irish government; that the search and rescue facilities were also provided by the Irish government for all users of the airport; and that the government officer in charge of the air traffic control was responsible for alerting the search and rescue organization if it should be required.

It was also the uncontradicted testimony that the government traffic control was responsible for seeing that the position reports which the aircraft should send were received within a specified time and that

if the position reports were not received, that traffic control would call the Ballygireen radio station and ask that steps be taken to get such reports.

Near the close of the trial, plaintiffs' attorneys brought out on cross-examination of the witness Melling, that Aer Lingus, an Irish airline, was the operational representative of KLM at Shannon and that Sabena under its contract with KLM was supposed to keep the operational representative informed of all movements of KLM aircraft and of any retarded progress or interruptions of these flights (JA 519a-520a). There was also read into evidence by plaintiffs' attorneys, one of Sabena's answers to an interrogatory which pointed out that the operational representative was "responsible for ground handling of Carrier's [KLM's] aircraft" (JA 61a). However, there was no other testimony as to what was required of this operational representative. Nevertheless, in the absence of any proof on the subject, the Court of Appeals gave its opinion that Sabena was guilty of wilful misconduct because it failed to "initiate through Aer Lingus emergency surface craft investigation in the area of the known takeoff pattern."

The Court of Appeals also made the unsupported and incorrect finding, based solely upon the gratuitous statements of plaintiffs' counsel during summation, that "Aer Lingus was the local facility capable of instituting a search." The inference on the court's part was that if Aer Lingus had been alerted by Sabena, Tuller's death might have been prevented. This was the rankest and sheerest speculation by the court and was based upon no evidence at all.

The trial court had charged that KLM and Sabena were covered by the provisions of the Warsaw Convention and that Sabena was the agent of KLM (JA 639a). With this part of the charge, the Court of Appeals apparently agreed (App. 34, 43). However, five times during the charge to the jury, the court indicated that the jury might bring in a verdict in excess of $8300 against both defendants if they found an act of wilful misconduct on the part of "either" of them.* Under this charge the agent was held to be liable for the act of the principal; a concept of liability utterly foreign to the laws of principal and agent, 2 C. J. 824.

At the conclusion of the court's charge to the jury, counsel approached the bench to note their objections or exceptions to the charge. After two of plaintiffs' counsel had noted their objections and requests, defendants' counsel attempted to note his objections and the following transpired (JA 648a):

> "Mr. Junkerman: Does Your Honor wish us at this time to express our exceptions?
>
> The Court: I took this charge up with both counsel, and in the circumstances, there is no exception to the charge. Now, don't tell me that there is."

Despite the foregoing and despite the fact that appellants raised this point on appeal, the Court of Appeals ignored the record and said (App. 51):

"We have examined the portions of the record

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* This statement appears in the Joint Appendix on the last two lines of page 640a; on lines 15 and 16 and on lines 31 and 32 of page 641a; on lines 3 and 4 of page 642a; and on lines 22 and 23 of page 646a.

relied on by appellants to show that the District Judge in some way impeded or prevented the recording of a timely objection. We are satisfied that appellants had full and uninhibited opportunity to object to the charge concerning the liability of SABENA if they desired but failed to do so."

E. The Court Permitted Gross Abuses in the Misuse of the Radio Operator's Deposition, in Allowing Plaintiffs to Impeach Their Own Witness, and in Making Rulings Highly Prejudicial to Defendants.

Plaintiffs took the deposition of Henri E. Oudshoorn, as a witness, in the United States Courthouse, Foley Square, New York, on March 16, 1959, pursuant to a subpoena that they had previously served upon him. At that time, Oudshoorn was employed as a dispatcher for Swissair, a Swiss airline, at Idlewild Airport, New York. Although he was the KLM radio operator on September 5, 1954, he had not been employed by or connected with KLM in any way since July 1958 (JA 274a-275a).

Although he was plaintiffs' witness as to numerous matters upon which there was no contradictory testimony, plaintiffs' counsel, who introduced parts of his deposition into evidence, repeatedly asked the jury to disbelieve Oudshoorn's testimony on practically every important item on which he had testified (JA 578a-579a, 580a-581a, 597a, 633a-634a).

Over defendant's objection, a statement made by Oudshoorn to an Irish government inspector on the afternoon of September 5, 1954, at Shannon Airport,

was received in evidence during the reading of his deposition (JA 313a-315a). The statement referred to reads as follows (JA 316a-317a):

> "Q. This may sound a stupid question, but I want to ask it in order to clear up a point here that would be in other evidence. Did you at any time use 121.5? A. After this happened?
>
> Q. At any time. A. No, sir. We were tuned at frequency of 118.7, the tower frequency, and I honestly must say I did not think when it happened to take the microphone and tell people there was something wrong on the plane. I could tell you that would never happen. You first think of your skin, and then of the microphone. That was my feeling, because it happened so fast."

The foregoing statement, made some twelve hours after the accident had no probative value other than to stir up passion, bias and prejudice on the part of the jury and that is exactly the way plaintiffs' counsel used it. He used the statement in summation as follows (JA 580a):

> "He thought of his skin, and the reason he was placed in that dilemma of choosing his own skin or Tuller's skin or the other passengers' skin was because he had been thrown out of his seat by the force of that shudder, * * *"

Once plaintiffs introduced into evidence Oudshoorn's deposition they made him their own witness. Thereafter they had no right to impeach and discredit him nor any right to attack his credibility by asking the jury to disbelieve his uncontradicted state-

ments. Fed. R. Civ. P. 26 (f); Wigmore on Evidence, Third Edition, §§912-913.

In commenting upon the Oudshoorn statement, the Court of Appeals said (App. 45-46): "The challenged statement must be viewed as an important piece of substantive evidence on the issue of wilful misconduct." The court cited no authority supporting such a holding—undoubtedly due to the fact that the authorities are to the contrary. As is pointed out in Wigmore on Evidence, Third Edition, §1018:

> "It is universally maintained by the Courts that Prior Self-Contradictions are not to be treated as having any *substantive* or *independent testimonial value.*" (Emphasis Wigmore's.)

Similarly, in *Southern Ry.* v. *Gray*, 241 U.S. 333 (1916), Mr. Justice Reynolds, in speaking for a unanimous Supreme Court, said (p. 337):

> "In an effort to discredit the passenger engineer, only witness to some circumstances, he was asked on cross-examination concerning prior contradictory statements; but the exclusion of all or any part of his evidence would not change the result. *Of course the contradictory statements can have no legal tendency to establish the truth of their subject-matter.* [citing cases]" (Emphasis supplied.)

The Court of Appeals, after conceding that the statement did "not meet the standards of res gestae, in relation to the accident" (App. 46), cited some totally unrelated decisions and concluded with the following ruling (App. 50):

> "We hold that the statement made by Oud-

> shorn, the KLM radio operator, as part of the authorized inquiry into the causes of the crash and relating to his duties and acts within the scope of his employment was properly admitted in evidence."

However, the statement had nothing to do with the cause of the crash. The record is clear that the statement was offered (JA 313a) and received by the trial judge (JA 315a) with the plain understanding that it was contradictory of Oudshoorn's deposition testimony as to why he had not sent an emergency message. As Mr. Justice Cardozo stated in *Shepard v. United States*, 290 U.S. 96, 103 (1933), "A trial becomes unfair if testimony thus accepted may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected."

II

The Court of Appeals has interpreted a federal treaty in such a manner as to render the treaty nugatory and void.

The opinion of the Court of Appeals notes that the phrase "wilful misconduct" occasioned considerable discussion in the drafting of the Warsaw Convention in 1929 and that the United States was not a participant in such discussions (App. 36). The court further points out that in the discussions at the conferences which finally drafted the Warsaw Convention, the English delegate said as to the meaning of the word "dol" appearing in the French original, "[W]e translate these words as 'wilful misconduct', a well-understood expression in our law" (App. 36). It additionally points out that when the Convention

was before the United States Senate for consideration in 1934 the word "dol" was translated* as "wilful misconduct" (footnote App. 36). Having thus briefly reviewed the conference discussions which led to the translation of "dol" in this country as "wilful misconduct", the Court of Appeals totally ignored the "well-understood expression" in English law, and equated wilful misconduct with "the negligence in question"; an interpretation expressly rejected both in England and this country.

In *Lewis* v. *Great Western Railway Co.*, [1877] 3 Q.B.D. 195, Bramwell, L. J., stated as follows (p. 206):

> "* * * 'Wilful misconduct' means misconduct to which the will is a party, something opposed to accident or negligence; the *mis*conduct, not the conduct, must be wilful. * * *"

And in the same case, Cotton, L. J., stated (p. 213):

> "* * * Now, I do not think there can be any doubt at all that wilful misconduct is something entirely different from negligence, and far beyond it, whether the negligence be culpable, or gross, or howsoever denominated. * * *"

In *Graham* v. *Belfast and Northern Counties Railway Co.*, [1901] 2 I.R. 13, defined this well-understood expression as follows (p. 19):

> "[W]ilful misconduct in such a special condition means misconduct to which the will is a party

* The French text, as proclaimed, is the official text. The original translation given by the Department of State for "dol" was "deception". Bulletin of Treaty Information, No. 7, Supplement dated October 12, 1929. In the Irish translation "dol" is translated as "malice". Air Navigation and Transport Act, 1936, First Schedule, Article 25.

> as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, * * *."

More recently, in *Horabin* v. *British Overseas Airways Corporation*, [1952] 2 A.E.R. 1016, this well-understood expression in English law has again been distinguished from negligence in a case involving the Warsaw Convention, as follows (p. 1019):

> "* * * Wilful misconduct, to put it most shortly, as it has often been put in the past, is misconduct to which the will is a party, and it is something which is wholly different in kind from mere negligence or carelessness, however gross that negligence or carelessness may be. * * *"

The incompatibility between the well-understood expression, wilful misconduct, and negligence is not limited to English law, but is recognized in this country as well, as the following illustrative cases clearly indicate:

Kelly v. *Malott*, 135 Fed. 74, 76 (7th Cir. 1905):

> "* * * Negligence and willfulness are as unmixable as oil and water. 'Willful negligence' is as self-contradictory as 'guilty innocence.'"

Baltimore & O. R. Co. v. *Felgenhauer*, 168 F.2d 12, 16 (8th Cir. 1948):

> "* * * And negligence and wilful misconduct are not synonymous. * * *"

New York, New Haven and Hartford R. Co. v. *Gray*, 240 F.2d 460, 464 (2d Cir. 1957):

> "* * * Negligence, whether or not 'gross,' but for which the accident would not have occurred, will

> not serve as a defense to such a policy. Only 'wilful misconduct,' measuring up to 'knavery' or 'design,' will suffice; and neither the evidence nor the judge's findings of fact show such conduct. True, the judge, in the last paragraph of his opinion, referred to the gross negligence as if it constituted wilful misconduct. There we think he erred. * * *"

From the foregoing it is abundantly clear that the Court of Appeals erroneously interpreted the expression "wilful misconduct" as it appears in Article 25 of the Warsaw Convention, when it stated that "the negligence in question contributed proximately to Tuller's death" (App. 43). If this interpretation of Article 25 is accepted, one of the basic purposes of the Convention, the establishment of uniform rules with respect to the liability of air carriers, will become wholly illusory. The right to limit liability, unless the damage is caused by the wilful misconduct—not the negligence—of the carrier is a right expressly conferred by the international treaty. This Court has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect, *Kolovrat* v. *Oregon*, 366 U.S. 187, 193 (1961). As was said by Mr. Justice Story in *The Amiable Isabella*, 6 Wheat. 1, 72, 19 U.S. 1, 32-33 (1821):

> "* * * [T]his court is bound to give effect to the stipulations of the treaty, in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. * * *"

III

The Court of Appeals has decided a question involving important rights asserted in reliance upon federal treaty obligations which has not been, but should be, settled by this Court.

The Warsaw Convention clearly declares as one of its basic purposes* "the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of * * * the liability of the carrier". Article 17 of the Convention imposes an absolute liability upon the carrier in the event of the death or wounding of a passenger, regardless of fault, "if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." This liability is excluded by Article 20(1) if the carrier proves that it has "taken all necessary measures to avoid the damage or that it was impossible" for it to take such measures. However, Article 25(1) provides that the carrier shall not be entitled to avail itself "of the provisions of this convention which exclude or limit" its liability, if the damage is caused by its "wilful misconduct" or by such default on its part as "in accordance with the law of the court to which the case is submitted" is equivalent to wilful misconduct. The exclusion refers to Article 20(1) and the limitation to Article 22(1) which provides that "the liability of the carrier for each passenger shall be limited" to $8,300.

The rights conferred by the Convention to exclude or limit liability would fall far short of the goal of

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* Preamble, 49 Stat. 3014.

uniformity if the courts of each of the fifty states and the District of Columbia are free to equate "the negligence in question" with wilful misconduct. Although the Convention provides that the right to limit liability is lost if the damage is caused by such default on the part of the carrier as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct, this Court has the right, indeed the duty, to exercise its power of supervision to the end that there is uniformity of interpretation of this international treaty by the courts of this nation, both state and federal. Without such uniformity there is no "supreme law of the land"; rather there are fifty-one possible divergent and hopelessly incompatible laws. The objective of uniformity is not achieved where, as here, the Court of Appeals pays mere lip service to the definition of wilful misconduct contained in the charge of the lower court to which the case was submitted, and then proceeds to equate wilful misconduct with "the negligence in question" (App. 43).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM J. JUNKERMAN,
Counsel for Petitioners.

Dated September 20, 1961

JAMES B. MCQUILLAN,
Of Counsel.

Pertinent Provisions of the Warsaw Convention

CHAPTER III. LIABILITY OF THE CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, dam-

ages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Pertinent Provisions of the Chicago Convention

PART I. AIR NAVIGATION

CHAPTER I

GENERAL PRINCIPLES AND APPLICATION OF THE CONVENTION

Article 1

The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

Article 2

For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

Chapter II

Flight Over Territory of Contracting States

* * * *

Article 11

Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.

Federal Rules of Civil Procedure

Rule 26. Depositions Pending Action.

* * * *

(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one

who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership or association which is a party may be used by an adverse party for any purpose.

* * * *

(f) Effect of Taking or Using Depositions. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

* * * *

Rule 51. Instructions to Jury: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Irish Air Navigation (Operations) Order, 1953

PART V

AIRCRAFT INSTRUMENTS, EQUIPMENT AND SAFETY DEVICES.

23. — * * *

(6) The operator of the aircraft shall take steps to the satisfaction of the Minister to ensure—

* * * *

(iii) that, if a landplane is to be flown over water beyond thirty minutes flying distance from the nearest shore, the passengers are shown before the takeoff, or before reaching thirty minutes flying distance from the nearest shore, the position of the life belts, or equivalents, and the method of their operation;

* * * *

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15716

KONINKLIJKE LUCHTVAART MAATSCHAPPIJ N.V. KLM ROYAL DUTCH AIRLINES HOLLAND, et al.,

Appellants,

v.

GERTRUDE OWEN TULLER, individually and as Executrix under the will of William Gordon Tuller, deceased, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided June 23, 1961

Mr. William J. Junkerman for appellants.

Mr. Murdaugh Stuart Madden for appellees.

Before: MR. JUSTICE REED, retired,* and WILBUR K. MILLER, Chief Judge, and BURGER, *Circuit Judge*.

BURGER, *Circuit Judge:* This is an appeal from a $350,000 judgment for the appellees in an action for

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* Sitting by designation pursuant to 28 U.S.C. § 294(a).

wrongful death. The decedent, William Gordon Tuller, was a passenger on a flight of Koninkijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland, (KLM), from Amsterdam to New York which crashed approximately one minute after take-off from its intermediate stop at Shannon, Ireland. The plane crashed in the tidewaters of the Shannon River some 7000 feet from the end of the airport runway. As the wheels of the plane left the ground, the control tower radioed its precise take-off time but the acknowledgment required to complete the take-off procedure was not forthcoming from the plane. Receiving no response, the tower made repeated attempts to make radio contact, without success. SABENA (Societe Anonyme Belge d'Exploitation De La Navigation Aerienne), KLM's agent and flight representative at Shannon, had a radio capable of monitoring such messages. On this occasion the monitor was turned off immediately after the tower sent its part of the take-off message without awaiting the plane's response. As a consequence SABENA officials were not aware for some time of the failure of the KLM flight to answer. When the tower eventually notified SABENA of the loss of radio contact, SABENA did not advise Aer Lingus, KLM's operational representative, although it was SABENA's duty under its contract to inform Aer Lingus of probable interruptions of service or retarded progress of the flight "as soon as possible." In the KLM plane three radio microphones were available to the flight crew, the pilot, co-pilot and radio officer, and each microphone was tuned to the tower frequency. Notwithstanding this, no distress message was transmitted either when the plane began to descend or after the crash. When the plane "shuddered" in a stall the

radio officer primarily charged with radio communications was thrown from his seat because he had failed to fasten his seat belt as required by operating regulations.

After the crash in shallow water, the crew evacuated most of the passengers to two rubber dinghies, which were moved along the side of the plane by means of ropes fastened to the fuselage. Tuller and another passenger made their escape through a rear window and stood on the tail of the airplane without life preservers. When their shouts were heard by the members of the crew in the second dinghy, the crew attempted to maneuver the dinghy around the wing. Finding the tow line too short, they cast off the line and attempted to paddle the dinghy to the tail, but their efforts were unsuccessful due to tide and wind and the inadequate size of the paddles. Additional ropes were available in the cockpit but were not used. The ship's officers made no effort to determine the condition of the passengers on the tail of the plane or to ascertain whether they had life vests.

For over four hours Tuller and his companion remained on the tail in a rising tide. Near dawn, information of the crash and its location finally reached the tower, and a launch was dispatched to the crash scene. Just as the launch approached, with the water by then chest high, Tuller lost his footing and slipped into the water; his body was later recovered. His companion was rescued.

A booklet inserted in the back of each seat of the plane stated that life vests could be found in one of three locations in KLM planes, but at no time was the matter of life vests brought to the attention of the passengers nor had they been told the specific location

of the vests in this airplane or how they should be fastened or inflated.

The jury was instructed that under the Warsaw Convention, which the court ruled governed the liability of the airlines, the damages were to be limited to $8300 unless the defendants were guilty of "wilful misconduct," in which case the $8300 limit did not control.[1] The jury returned a verdict for the plaintiff in the amount of $350,000.

The appeal presents these issues:

(1) Was there sufficient evidence of "wilful misconduct" to go to the jury?

(2) Was there error in the reception in evidence of

(a) an Irish order pertaining to instruction on use and location of life vests,

(b) pages of a KLM manual relating to ditching procedures,

(c) the contract between KLM and SABENA,

(d) a statement made by the radio operator at a hearing before Irish authorities some twelve hours after the crash?

(3) Was there reversible error in the failure of the trial judge, absent request or objection, to clarify

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[1] The Warsaw Convention provides:

"(1.) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct." Warsaw Convention, Art. 25, 49 Stat. 3020 (1934).

the impact of KLM's negligence on SABENA's liability?

(4) Was there sufficient evidence to support the damage award?

Evidence of Wilful Misconduct

At the close of the case appellants moved to dismiss the complaint for all amounts in excess of $8300 and for a directed verdict in favor of appellees for $8300 for want of evidence of wilful misconduct under the terms of the Warsaw Convention. In considering whether the appellants were, as they claim, entitled to the relief they sought by their motion we are, of course, obliged to take that view of the evidence most favorable to appellees and give them the benefit of all inferences which might reasonably be drawn from the evidence. *Gunning* v. *Cooley*, 281 U.S. 90, 94 (1930).

> On a motion for a directed verdict, "* * * it is well settled that the evidence must be construed most favorably to the plaintiff; to this end he is entitled to the full effect of every legitimate inference therefrom. If upon the evidence, so considered, reasonable men might differ, the case should go to the jury; if, on the other hand, no reasonable man could reach a verdict in favor of the plaintiff, the motion should be granted." *Jackson* v. *Capital Transit Co.*, 69 App.D.C. 147, 148, 99 F.2d 380, 381 (1938), *cert. denied*, 306 U.S. 630 (1939), quoted in *Kendall* v. *Gore Properties, Inc.*, 98 U.S.App.D.C. 378, 384 n.3, 236 F.2d 673, 679 n.3 (1956).

The jury was instructed that "wilful misconduct is the intentional performance of an act with knowledge that the . . . act will probably result in injury or damage, or . . . in some manner as to imply reckless disregard of the consequences of its performance; and likewise, it also means . . . failure to act" in such circumstances. This was substantially the charge approved by this court in *American Airlines, Inc.* v. *Ulen*, 87 U.S.App.D.C. 307, 186 F.2d 529 (1949), where we also suggested that wilful misconduct means "a deliberate purpose not to discharge some duty necessary to safety." *Id.* at 311, 186 F.2d at 533.

The phrase "wilful misconduct" occasioned considerable discussion in the drafting of the Warsaw Convention in 1929. Liability was limited to 125,000 French francs (then approximately $12,500—and now approximately $8,300) for a single passenger unless Article 25 of the Convention applied. See note 1, *supra*. The United States was not a participant but in the discussions relating to the meaning of the French word "dol" used in the text of Article 25 the English delegate said "I wish it to be noted on the record that as a result of the explanations we translate these words[2] as 'wilful misconduct,' a well-understood expression in our law."[2]

[2] We have in our country the expression 'wilful misconduct' . . . it covers not only acts accomplished with deliberation, but also acts of carelessness, without regard of the consequences." Proces-Verbaux II Conference Internationale de Droit Prive Aerien, 4-12 Octobre 1929, Varsovie, p. 40-42, published by the Ministry of Foreign Affairs of Poland, 1930. The declaration of adherence to the Convention as advised by the Senate was accompanied by an English translation which used the words "wilful misconduct" to translate "dol." 49 Stat. 3020 (1934). This was the English translation before the Senate for consideration. 78 Cong. Rec. 11580 (1934).

The alleged wilful misconduct of the appellants in this case resolves itself into four elements: (1) failure to properly instruct passengers of the location of life vests and in their use; (2) failure to broadcast an emergency message; (3) failure to take steps to provide for the safety of Tuller after his peril was known; (4) failure of SABENA to be aware of the loss of radio communication with the plane and to initiate prompt search and rescue operations.

(1) The evidence showed that Tuller was alive within seconds before the rescue launch reached the airplane, but that he lost his footing, fell into the water, and was lost. Since the parties stipulated that Tuller was not injured in the crash, the jury could reasonably have inferred that if Tuller had been wearing a life vest his life could have been saved. Significantly, the crew members, who knew the location of life vests, realized the need and promptly put them on.

There was testimony that no announcements or instructions concerning life vests were made to passengers before take-offs or during flight, and the passenger who stood with Tuller on the tail testified that he did not know where the life vests were located. The descriptive booklets inserted in the back of each seat stated that the life vests could be found in one of three places, but at no time were the passengers informed where they could be found in this particular aircraft. Regulations of the Irish Government do not require life vest instructions unless a flight is more than 30 minutes travel from land. This flight was always within 30 minutes flight from land provided it maintained normal flying speed—and remained airborne, which of course it did not.

In view of the gravity of the harm which would fol-

low an emergency landing on water on a night flight which contemplated landings and take-offs at at least two airports near the sea, the jury could reasonably find that the failure of KLM to establish and execute procedures to instruct passengers as to the location and use of life vests was a conscious and wilful omission to perform a positive duty and constituted reckless disregard of the consequences. We are not bound by the limits of the Irish Government's regulations as to when life vest instructions should be given to fulfill the duty of care owed to passengers. *Cf. Horobin* v. *British Airways Corp.* [1952] 2 A.E.R. 1016, 1019 (Q.B.).

(2) A distress message could have been sent merely by uttering the universal distress signal in the words "King Yoke Mayday" or even "Mayday." Immediately before take-off the radio officer was at his desk in the plane with a microphone before him tuned to the tower frequency. But during the descent he was thrown to the floor because he had failed to take his seat and fasten his seat belt. The KLM operations manual required all personnel to have a "conscious anticipation prior to take off of possible failure," and to send a distress message as soon as an emergency arose.[3] Regulations of the Irish Government also required public transport aircraft to notify appropriate authorities "by the quickest means available" of any accident involving the aircraft. The plane was equipped with radio microphones at three positions; the pilot's, the co-pilot's and the radio operator's.

[3] The KLM operating manual, page 36, states:

"Surface stations and ships should be informed of the existence of an emergency as soon as it arises. This should be done even if it is not certain that the airplane will have to be ditched. It is easy enough to cancel the call after the emergency is over."

Here there was a brief period, even if only seconds, as to which a jury could reasonably find that the behavior of the plane gave notice of a possible crash and time sufficient to utter the distress signal. Furthermore, there was no attempt to send a message *after* the crash; there was evidence that the electrical system was so organized that the plane's radio would operate from independent power after the main ignition switch was thrown to avoid explosion and fire. In addition there was a portable emergency radio operable by hand crank in the rear of the plane.

Had a message been sent the control tower by any of the available means, the authorities would have been immediately aware of the crash and rescue equipment could have been dispatched promptly rather than some four hours later. Accordingly, the jury was warranted in concluding that KLM's agents, in failing to send a distress message, committed wilful misconduct.

(3) After the first dinghy was filled with passengers, the captain instructed the crewman in charge to take it to shore. The captain and radio officer made a final check for passengers in the cabin and then boarded the second dinghy. Shouts were heard from the passengers on the tail, and the crewmen attempted to maneuver the dinghy around the wing with the ropes attached to the fuselage. Finding the rope too short, and fearing to take the dinghy over the sharp edge of the wing, they released the rope and tried to paddle the dinghy. But the round rubber vessel would not respond to their small paddles and instead drifted with the tide toward the shore. The crewmen had no experience in the use of the dinghies except in a large swimming pool.

The crew was aware that it was possible to maneuver the dinghy by ropes attached to the fuselage because they had previously maneuvered it to the main door in that fashion. Moreover, additional lengths of rope sufficient to reach the tail were available in the cockpit. Various alternatives were plainly available: one of the crew could have swum to the tail of the plane with the rope and pulled the dinghy to the men or vice versa, as had been done with respect to moving the dinghy in earlier maneuvering. No effort was made to put a crew member on top of the cabin by use of ropes thrown, or carried by a swimmer, to the opposite wing engines. Had this been done the tail passengers might well have been guided over the top of the cabin to the dinghy. The jury could reasonably find that under these circumstances the failure to take available steps to provide for Tuller's safety was a conscious omission made with reckless disregard of the consequences when it was known he was in a position of peril. There is no suggestion that the departure of the second dinghy without making some effort to provide for Tuller's safety was necessary to protect the lives of the occupants of that dinghy.

(4) As agent for KLM, SABENA was charged by contract[4] with checking the progress of the flight and

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[4] SABENA contracted to "render . . . services to the Carrier's [KLM's] flight operating within the area of responsibility [at Shannon] as described in Paragraph 3 of this Annex thereby maintaining close liaison with the operational representative [Aer Lingus] designated by the Carrier so as to coordinate his requirements."

* * * *

"Maintain contact with all flights within his area of responsibility noting advanced or retarded progress as compared with flight plan and inform the operational representative [Aer Lingus] designated by the Carrier."

* * * *

"In the event of an emergency, take action necessary for the

notifying Aer Lingus, the operational representative of KLM, in the case of retarded progress of the flight. However, as a result of the switching off of the SABENA monitor radio without waiting for completion of the take-off message and before it was known whether the airplane had failed to respond together with the absence of SABENA employees from the office at subsequent periods, Aer Lingus was not notified of the loss of communication for several hours, nor was the KLM station manager so notified.[5]

While the control tower personnel had broad duties with respect to contact with the plane and did in fact remain aware of the plane's failure to respond, SABENA as KLM's agent had *contract* duties as noted in the margin. But SABENA was seemingly satisfied with the loss of contact with the KLM plane at the critical moments of take-off, landings and take-offs being the most hazardous of their operations. In view of this it is less surprising that the tower personnel did not pursue the matter aggressively. The vital importance of communication between pilot and control tower is suggested by the severe governmental sanctions for failure to perform required acts of com-

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safety of the flight being guided by the instructions in the relevant Operations Manual. . . ."

* * * *

"Report the complete facts of any incident of a flight operation nature which causes delay or interruption of a flight to the operations department of the Carrier."

* * * *

"Ensure that probable or known interruptions to schedules for flight operational reasons . . . are given as soon as possible to the operational representatives designated by the Carrier."

[5] There was evidence that it was the established practice that a radio message was not regarded as complete until acknowledged by the recipient. The tower continued to request acknowledgment of its take-off message.

munication. The search and rescue organization of the Shannon airport did not have its own planes. As KLM's operational representative, Aer Lingus was the local facility capable of instituting a search. In recognition of this, the contract between KLM and SABENA, as we have noted, required SABENA to advise Aer Lingus immediately of any facts related to an interruption of service, and to keep Aer Lingus informed of the movements of the aircraft. Some forty-eight minutes after take-off, a SABENA agent learned from the control tower that radio contact with the plane had ceased shortly after take-off. Nevertheless, Aer Lingus was not notified of this fact for another hour and thirty minutes. Finally aware of loss of contact and the plane's failure to report a safe and completed take-off SABENA as KLM's representative had a duty to "take action necessary for the safety of the flight" and press every available inquiry and to initiate through Aer Lingus emergency surface craft investigation in the area of the known take-off pattern.

There no real effort was made to check on the "missing" plane until nearly two hours after take-off when the tower sighted flares in the take-off pattern of the KLM plane. Even then no surface craft were dispatched. Later another plane in routine flight sighted the crashed ship in the growing light of dawn and finally surface craft were dispatched. SABENA's failure to inform Aer Lingus of the loss of communication with the plane it was responsible for, plainly delayed emergency search and rescue action which, had it been initiated in these circumstances even as much as five minutes earlier, could have prevented Tuiler's death. The defaults of SABENA as KLM's ground agent were conscious omissions of performance

of positive duties relating directly to the safety of passengers.

We hold that as to each of the categories of alleged wilful misconduct of KLM there was sufficient evidence from which a jury could reasonably find that KLM was guilty of wilful misconduct as that term has been interpreted by this court under the Warsaw Convention; we hold also that there was sufficient evidence from which a jury could reasonably find that SABENA was guilty of wilful misconduct as that term has been interpreted by this court under the Warsaw Convention. There is also evidence from which a jury could reasonably find that as to each category of wilful misconduct the negligence in question contributed proximately to Tuller's death.

Alleged Errors in the Reception of Evidence

(1) *Irish order as to life vests.* Appellants' objections go solely to the interpretation put upon this order by appellees' counsel in argument to the jury. The applicability of the order was a fair subject of comment in argument and there is no substantial basis for disturbing the verdict on this ground.

(2) *KLM manual.* Pages of a KLM manual relating to the duties of the radio operator when there is a "ditching" of the airplane were admitted over objection. The ground of the objection was that the manual applied only to planned and controlled emergency landing on water and not to an involuntary crash landing. As a result of questions by the appellees' counsel, and questions by the trial judge after impeachment of the witness by a prior deposition, a sufficient foundation was laid for the admission of this

manual in evidence. The radio operator finally admitted that if a crash occurred it was the duty of the crew to carry out as many as possible of the planned ditching procedures.

(3) *KLM-SABENA* contract. It is urged as error that the contract between KLM and SABENA was not construed by the trial court and was the subject of argument in appellees' summation. Appellants did not request specific instructions on the meaning of the contract and made no objection after the charge; they are precluded from raising this objection now. FED. R. CIV. P. 51.

(4) *Radio operator's statement.* Appellees took the deposition of the KLM radio operator, Oudshorn, after his employment with KLM was terminated. In the deposition, which was received as part of the appellees' case in chief, the radio operator stated that he did not send a distress message before the plane crashed because there was not sufficient time to do so. He was then asked if he had made a statement to the Inspector of Accidents at the Shannon airport some hours after the crash. The witness admitted making statements at the hearing in question, which he said was attended by "one of our chief flight engineers of KLM . . . one of the people of the Dutch CAA" and others. At this point appellees offered and the court received over objection a transcript of the radio operator's statement at the hearing before the Inspector of Accidents. Appellants objected to the proffered transcript of Oudshorn's statement on the ground that "it is not part of the res gestae," thus indicating that the statement was challenged as hearsay. After argument the District Court after first indicating that he

regarded it as part of the res gestae, then reconsidered and ruled that

> The statement refers to the accident, otherwise there would be no purpose in having the statement made. It was made . . . at Shannon on the same (488) day of the accident and in response to the particular question as to why he didn't send the message.
>
> I think it is admissible and I will let it in.

The pertinent part of the statement made by Oudshorn at that time was

> We were tuned at frequency of 118.7, the tower frequency, and I honestly must say that I did not think when it happened, to take the microphone and tell people there was something wrong on the plane. I could tell you that would never happen. *You first think of your skin, and then of the microphone*. That was my feeling, because it happened so fast. (Emphasis added.)

The trial judge did not try to limit the effect of this statement in any way. Realistically it could not have been admitted merely for purposes of impeachment in the circumstances shown here.[6] The challenged state-

[6] Appellants' contention that the appellees improperly impeached their own witness, Oudshorn, is contradicted in appellants' own brief by the argument that:

> "The foregoing statement was actually not a contradiction of Oudshoorn's testimony that the accident happened so fast that there was not time to switch the frequencies in order to send out a message and that he did not think of doing so. The statement made some 12 hours after the accident that at the time of an airplane crash one thinks of one's skin before thinking of a microphone, was no more than a mental reaction at the time it was given. It had no probative value other than to stir up passion, bias and prejudice on the part of the jury and that is exactly the way plaintiffs' counsel used it."

ment must be viewed as an important piece of substantive evidence on the issue of wilful misconduct. As such it disclosed an awareness of the existing risks and had a direct bearing on whether there was reckless disregard of the dangers to which the plane and its passengers were exposed.

Appellants argue that the challenged statement does not fall within any of the exceptions to the hearsay rule, pointing out particularly that the hearing at which it was made occurred 8 to 10 hours after the crash. We agree that the utterance was too remote in point of time from the event to sustain its admission as part of the res gestae. However spontaneous in the context of the hearing, it does not meet the standards of res gestae, in relation to the accident.

Appellees contend that Oudshorn's post-accident statement is admissible because it was made while he was an employee of KLM and was his explanation of his performance of duties within the scope of his employment. From this they urge that the utterance is imputable to KLM. In answer to this appellants contend that the radio operator was not a KLM employee when the deposition was taken or when the testimony was read into evidence at trial, and that the radio operator had no duty or authority to make declarations binding on KLM at the hearing of the Inspector of Accidents.

The radio operator was a KLM employee when he uttered the challenged statement. It is true that members of the flight crew of an airline are hired primarily to work for the airline, not to speak for it. But in this context, having in mind the public nature of the duties of a common carrier and the duties of crew members toward common carrier passengers, it was as much a part of the crew's duties to account to

public authority for the manner in which those duties were discharged as it would be to account or report to the employer. Whether KLM acquiesced in the inquiry, or whether it had no choice in the matter is not entirely clear from the record; however the record discloses that a KLM representative was present at the hearing and that Oudshorn's statements were recorded without objection.

Many writers on evidence[7] have urged that rejecting early post-accident statements of an employee while receiving the employee's considered statements in the courtroom perhaps several years after the event is to give preference to the weaker over the stronger evidence. Had Oudshorn made substantially the same utterance within the hearing of a passenger as he emerged from the cabin of the plane we would permit the passenger to testify to what was said as part of the res gestae; yet the passenger's testimony might well come three or four years after the event and be dependent upon his recollection of the words uttered. That, surely, is not more reliable than Oudshorn's statement, against his interest, uttered and recorded some eight hours after the rescue, in a formal process of reporting to the Irish Government concerning the occurrence.

Apparently with this in mind the proposed Model Code of Evidence rule 508(a) admits the employee's statement if "the declaration concerned matter within the scope" of the declarant's employment. See also *Slifka* v. *Johnson*, 161 F.2d 467 (2d Cir.), *cert. denied*, 332 U.S. 758 (1947); *Martin* v. *Savage Truck Line*, 121 F. Supp. 417 (D.D.C. 1954). Oudshorn's statement clearly concerned a matter within the scope

[7] See McCormick, Evidence, § 244, at 519–1951

of the radio operator's employment, since his compliance with undisputed safety regulations was in question.[8] Had he been at his assigned post with his microphone at hand and his instruments tuned to the tower frequency, as they were, he could have uttered the "Mayday" distress signal in a fraction of a second. His explanation of his failure to do this was within the scope of his duties.

Since reliability is the basic test for the admission of any hearsay statement, the interest of the one who utters it and the one to be charged is always important. That this statement is adverse to the interest of KLM is plain. The statement was also adverse to Oudshorn's personal interests in that it entailed the possible loss of his employment, impairment of his future employment opportunities, possible civil liability for Tuller's death, and even the

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[8] Oudshorn testified:

"Q. Did every member of the flight crew have a seat with a seat belt? A. That's right.

"Q. What is the purpose of seat belts? A. Well, in case of an accident, or in sudden stop or acceleration, that you are not thrown out of your chair.

"Q. And you can continue your duties? A. That's right.

"Q. If you are not thrown out of your chair? A. That's right.

"Q. Is there any regulation requiring that these seat belts be fastened at any particular time? A. Yes, during take off and landing they are supposed to be fastened.

"Q. When you say 'during take off,' how much time does that encompass during take off? A. Well, that means from when you start off blocks until the Captain gives the command to switch off the sign 'Fasten seat belts.'"

* * * *

"Q. Did you feel at the time you felt this shudder, and when you were thrown out of your seat, (466) that the plane was going to crash? Did you have that sensation, that you were going to crash? A. I, personally, had that sensation when I felt this unusual shudder, and going down, that this was a crash. My personal opinion was that it was that."

possibility of criminal sanctions. We think that such a recorded statement meets any reasonable test of reliability. The official nature of the inquiry which elicited the statement, the independent recording of the statement, the source of the utterance, and the interest of the utterer all combine to give the statement the earmarks of reliability absent in *Palmer* v. *Hoffman*, 318 U.S. 109 (1943). Surely, it cannot be said, as to the employee who uttered it or the employer who is charged with it, that its "primary utility is in litigating. . . ." *Id.* at 114. See *Pekelis* v. *TWA*, 187 F.2d 122, 130 (2d Cir), *cert. denied*, 341 U.S. 951 (1951).

The Second Circuit considered the application of the federal shop book rule, 28 U.S.C. § 1732 (1958) to a similar situation in *Pekelis* v. *TWA*, *supra*. There reports of an airline accident investigation conducted by the airline for its own purposes were held admissible. Noting that the challenged material was not favorable to the airline's interests, that court gave the interest factor significant weight in determining "their earmarks of reliability" and in distinguishing *Palmer* v. *Hoffman*, *supra*. We need not reach the question whether the challenged statement here is admissible under the federal shop book rule in light of our holding that it is admissible on other grounds.

We emphasize that we are not here confronted with the problem of the admissibility of opinion evidence. See *New York Life Ins. Co.* v. *Taylor*, 79 U.S.App. D.C. 66, 147 F.2d 297 (1944); *Washington Coca-Cola Bottling Works, Inc.* v. *Taveney*, 98 U.S.App.D.C. 151, 233 F.2d 353 (1956). An added distinguishing factor is that KLM had full opportunity to cross-examine Oudshorn when the deposition was taken for the purposes of this case.

We are not unaware of the traditional arguments which can be advanced that exclusion of post-accident statements of this type may have value in that it tends to encourage free and full disclosure of information. See McCORMICK, EVIDENCE § 78, at 160-61 (1954). But the problem is one of balancing competing considerations and on balance we think the ends of justice are better served by receiving such statements when found to be reliable.

We hold that the statement made by Oudshorn, the KLM radio operator, as part of the authorized inquiry into the causes of the crash and relating to his duties and acts within the scope of his employment was properly admitted in evidence.

Alleged Errors in Instructions

Appellants' brief does not assert any errors in the trial court's instructions to the jury. However, it is contended that the trial judge precluded exceptions to the charge, and that error occurred in the charge with respect to the liability of SABENA. Appellants' supplemental memorandum suggests that the trial court failed to instruct correctly on the liability of SABENA in that the jury was told that a finding of wilful misconduct by *either* or both defendants would bring them to the issue of proximate cause. At no point did the court instruct the jury that if the wilful misconduct were committed solely by KLM, the principal, SABENA, the agent, could not be held liable. No such instruction was requested and no objection was taken to the charge in this respect. It should be noted that KLM and SABENA were represented by the same counsel, although obviously at this point their interests inevitably diverged. Rule

51 of the Fed. R. Civ. P. requires that objection be taken to errors in the charge in order to claim error on appeal. Some courts have taken the view that "the 'plain error' rule may not be utilized in civil appeals to obtain a review of instructions given or refused, where the ground was not raised in the trial court." *Bertrand* v. *Southern Pac. Co.*, 282 F.2d 569, 572 (9th Cir. 1960), *cert. denied*, 365 U.S. 816 (1961).

Of course, if the trial court in fact *prevented* the objection from being made, an inviting case for the application of the "plain error" rule would be presented. We have examined the portions of the record relied on by appellants to show that the District Judge in some way impeded or prevented the recording of a timely objection. We are satisfied that appellants had full and uninhibited opportunity to object to the charge concerning the liability of SABENA if they desired but failed to do so. The trial of this cause was long and expensive and the contentions underscore the need for strict compliance with the rule which treats as waived that to which no timely objection is made.

The claimed error in the scope of appellees' argument to the jury does not merit comment.

Damages

The jury returned a verdict of $350,000 for the appellees. The evidence on the damage issue showed a life expectancy of 36½ years. Tuller earned a salary of approximately $27,000 or $20,000 a year after taxes as vice-president in charge of engineering

at Melpar, a division of Westinghouse Airbrake.[9] Besides his widow, Tuiler was survived by two children then aged four and eight respectively.

The award of $350,000 is attacked as so excessive that it should have been set aside by the District Court. We pointed out in *Hulett v. Brinson*, 97 U.S. App.D.C. 139, 142, 229 F.2d 22, 25 (1955), *cert. denied*, 350 U.S. 1014 (1956), "that the rule in the Federal courts is that an appellate court may reverse, if at all, for excessiveness of verdict only where the verdict is so grossly excessive or monstrous as to demonstrate clearly that the trial court has abused its discretion in permitting it to stand." See *Affolder v. New York, C. & St. L. R.*, 339 U.S. 96, 101 (1950). On the whole record we cannot say that the action of the District Judge who tried the case and heard the post-trial motions constitutes an abuse of discretion or that appellate action with respect to damages is required.

Affirmed.

[9] The appellees tendered but the District Court rejected proffered evidence purporting to show that Tuiler's income would increase over the full span of life expectancy. Such evidence was relevant and should have been received. O'Connor v. United States, 269 F.2d 578 (2d Cir. 1959).